(1)

92-271

No. _____

Supreme Court, U.S.
FILED
JUN 11 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

CEDRIC ADAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FROM THE ELEVENTH CIRCUIT

RICHARD H. MORGAN, Jr.
Attorney for Petitioner
47 N. Saginaw Street
Pontiac, Michigan 48342
(313) 334-8970

4/1

QUESTIONS PRESENTED

I. Whether or not the United States District Court committed reversivable error in denying appellant's request to instruct the jury on the theory of entrapment where such a theory was supported by the evidence.

II. Whether or not appellant was denied his constitutional right to due process and a trial by an impartial jury where the District Court gave a modified Allen charge to the jury, which was prejudicial and coercive, where the jury indicated it was deadlocked, but returned a verdict of guilty after only one additional hour of deliberation.

LIST OF PARTIES

The parties to this appeal are as follows:

The Petitioner is Cedric Adams. His attorney is Richard H. Morgan, Jr., whose name and address appears on the front of this Petition.

The respondents are the United States of America. The United States is represented by Dexter W. Lehtinen, United States Attorney, Attorney for Appellee and Jeffrey R. Levenson, Assistant United States Attorney, 155 South Miami Avenue, Miami, Florida 33130-1693.

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ISSUE I

The District Court committed error in denying Petitioner's request to instruct the jury on the theory of entrapment where such a theory was supported by the evidence.

ISSUE II

Petitioner was denied his constitutional right to due process and a trial by an impartial jury where the district court gave a modified Allen charge to the jury, which was prejudicial and coercive, where the jury indicated it was deadlocked, but returned a verdict of guilty after only one additional hour of deliberation.

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No._____

In The
SUPREME COURT OF THE UNITED STATES
October Term 1992

CEDRIC ADAMS,
Defendant-Appellant,,

Petitioner,

vs.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The Petitioner, Cedric Adams, the Defendant in this case, respectfully prays that a writ of certiorari issue to review the judgment of the United States District Court where said court denied petitioner's request for a jury instruction on

entrapment, and for giving a modified "Allen Charge". Said judgment being affirmed by the United States Court of Appeals for the Eleventh Circuit. Should this Honorable Court find that the Court of Appeals Opinion and Order in this case not be deemed to constitute a judgment for the purpose of review, then Petitioner respectfully requests that this Court exercise its original jurisdiction and issue a writ of mandamus compelling the Eleventh Circuit Court of Appeals to modify its Opinion and Order so as to prevent irreparable harm to Petitioner.

OPINIONS BELOW

The March 12, 1992 Opinion of the United States Court of Appeals for the Eleventh Circuit, in this matter has not been published, it does appear at A1 (Appendix page 1)

The United States District Court's judgment appears at A2 (Appendix page 2).

JURISDICTION

Defendant Cedric Adams was convicted on October 5, 1991, in the United States District Court, Southern District of Florida, The Honorable Jose

A. Gonzalez, Jr., Presiding, of knowingly and intentionally attempting to possess cocaine with the intent to distribute it, in violation of Title 21 United States Code, Section 846. Defendant was sentenced on January 11, 1991 to a term of One Hundred Sixty-Eight months, and thereafter to serve a five year term of supervised release. Defendant appealed to the United States Court of Appeals for the Eleventh Circuit where said conviction was affirmed March 12, 1992.

The questions presented require plenary consideration as Petitioner was denied his request for a jury instruction on entrapment and his constitutional right to an impartial jury where said jury was given a modified "Allen Charge" over the objection of counsel.

The decision of The United States Court of Appeals for the Eleventh Circuit conflicts with decisions of the United States Supreme Court as well as the 1st, 5th and 11th Circuits of the United States as well as the Court of Appeals. It is believed that this court has jurisdiction by virtue of 28 U.S.C. 1254 .

STATEMENT OF THE CASE

The trial in this matter commenced on October 2, 1990. After opening statements were given the people called their only witness, Special Agent Salvatore Di Jamco. In summary, agent DiJamco testified that he participated in the investigation of appellant Cedric Adams, that on January 18, 1990 he had occasion to meet with Mr. Adams and that at this meeting Dee Woods and Jeffrey Schoen were also present. He further stated in his testimony that he was posing as a seller of drugs in this "reverse sting" operation. Agent DiJamco stated that the sell and purchase of drugs was discussed at this meeting, with appellant being "the middleman" acting on behalf of third persons. He continued to state details of the drug transaction and that he participated in the arrest of Appellant Adams.

On cross examination agent DiJamco stated that Ms. Dee Woods was operating as a confidential informant for the government, that she had obtained this position by walking in the D.E.A. office

from off the street and volunteering her services. He stated that Ms. Woods was previously involved in drug trafficking and that she was now getting paid for her services with the D.E.A. Agent DiJamco further stated that on January 21, 1990, the date of Appellants arrest, there were no drugs present at anytime.

At the close of agent DiJamco's testimony the Government rested.

Defense called its first witness, Ms. Della Woods. Ms. Woods testified that she was an informant for the D.E.A., that she had met Cedric Adams through business contacts through her hair product business. Ms. Woods stated in her testimony that she solicited Cedric Adams to sell marijuana for her and he refused. (T-77)

She further stated that she had numerous conversations with Mr. Adams where upon she would beep him on his beeper and he would call her back.

Ms. Woods further testified that Mr. Adams contacted her near the end of November to see how things were going and she indicated slow. She

further states that she told D.E.A. agents that she knew someone that needed to get a hold of something, however, she then testifies that she asked Mr. Adams if he knew "somebody with a landing strip, we have some airplanes we need to bring in here." (T-88) She also asked him if he "knew someone with a fast boat to bring cocaine in here", (T88) to which he answered no. She testifies that she wanted to see what part he would play in a drug transaction. She states that Mr. Adams was anxious to consumate a deal, however he did not produce any buyers, and in fact she states she did not think he would be able to produce any buyers (T-102).

The witness further testified that she was offered Twenty Five Percent of any seizure resulting from a case she was working on. That in this particular case she was paid twenty one thousand dollars from the money seized, plus an advance payment of four or five thousand dollars. She also states that she consented to have a wire tap placed on her phone.

On cross examination Ms. Woods stated that she had previously been involved in trafficking cocaine, contrary to her testimony on direct examination that she had not (T-86, T-116 and T-141). There were other discrepancies in Ms. Woods testimony where she stated on direct that she had not made calls to Mr. Adams and on cross she stated she had. Ms. Woods testified to the details of the attempted drug transfer and her interpretation of the tape recorded conversations she had with appellant. There was no mention of buying or selling any drugs however she states they used other terms and she indicates what she understood them to mean.

On redirect Ms. Woods stated that the initial buy was to be for only one or two kilograms of cocaine but by the end of the deal it was up to 15 kilos and then back down to five. She stated that these initial conversations, although recorded, were not submitted to the jury. Ms. Woods stated that Mr. Adams initially only asked for small quantities of drugs but that she informed him that

her suppliers would not do such a small deal. (T-152) She further indicates that even when the buy took place appellant was only purchasing one kilo for himself.

Defense then called its next witness agent Bronson. Agent Bronson testified that he supervised Ms. Woods throughout this investigation and to the events that occurred on the day of defendants arrest.

Before resting the defense called one other witness, Ms. Shirley De Lions. Ms. De Lions testified regarding her relationship with the appellant. She testified that Ms. Della Woods had called her apartment looking for the defendant on several occasions. (T-171).

On cross examination she stated that the appellant had used her phone on several occasions. After the testimony of Ms. De Lions the defense rested.

At the close of the case defense counsel requested an instruction on entrapment as it had been shown through the testimony of Ms. Woods.

The District Court denied this request. Jury instructions were given and the jury retired for deliberations at 9:35 a.m, on October 4, 1990. At 10:00 a.m. the jury requested to hear the tape recorded conversations between the defendant and Ms. Woods. The request was granted. At 11:25 a.m. the jury requested to view the video tape of the alleged transaction. The request was granted. At 3:55 p.m. the jury stated that they were unable to reach a verdict and wanted to hear the instructions again. The request was granted. The jury resumed deliberations again at 4:20 p.m. and approximately one hour later informed the court that they were unable to reach a unanimous verdict. The court then recessed until the following day. The court resumed on October 5, 1990 and the court indicated it would be giving the "Allen" charge to the jury. Defense counsel objected stating that the jury had honestly and sincerely deliberated the evidence that was presented before them based

upon the questions asked of the court and they were unable to reach a unanimous decision. Defense counsel then asked for the court to declare a hung jury. This request was denied. The court gave a modified Allen charge to the jury at 9:00 a.m., which stated as follows:

The Court: Please be seated. Members of the jury, I'm going to ask that you continue your deliberations in an effort to reach agreement upon a verdict and dispose of this case; and I do have a few additional comments I would like for you to consider as you do so.

As you know, this is an important case. The trial has been expenseive in time, effort, money, and emotional strain to both the defendant and the prosecution.

If you should fail to agree upon a verdict, the case will be left open and may have to be tried again.

Obviously, another trial would <u>only</u> serve to increase the cost to both sides, and there is

no reason to believe the case can be tried again by either side any better or more exhaustively then it has been tried before you.

Any future jury must be selected in the same manner and from the same source as you were choosen, and there is no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced.

If a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one, since it appears to make no effective impression on the minds of the others.

On the other hand, if a majority or even a lesser number of you are in favor of an acquittal, the rest of you should ask yourselves again, and most thoughtfullly, whether you should accept the weight and sufficiency of evidence which fails to convince your fellow jurors beyond a reasonable doubt.

Remember at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence; but after full deliberation and consideration of the evidence in the case, it is your duty to agree upon a verdict if you can do so.

You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt, the defendant should have your unanimous verdict of not guilty.

You may be as leisurely in your deliberations as the occasion may require, and should take all the time which you may feel is necessary.

I will ask now that you retire once again and continue your deliberations with these additional comments in mind to be applied, of course, in conjunction with all of the other instructions previously given you. The jury went out to deliberate at 9:15 a.m. The jury returned a verdict at 10:30 a.m.

REASONS FOR GRANTING WRIT

I. The District Court Committed Error in Denying Petitioner's Request to Instruct the Jury on the Theory of Entrapment where such a theory was supported by the Evidence.

Petitioner Cedric Adams was tried on October 2, 1990 for knowingly and intentionally attempting to possess cocaine with intent to distribute it. Upon completion of the trial Defense Counsel requested the court to give an instruction on entrapment to the jury, based on the evidence which was presented to the jury. The court denied Defendant's motion. The decision of the trial court was appealed and affirmed by United States Court of Appeals for the Eleventh Circuit.

The decision of the United States Court of Appeals for the Eleventh Circuit conflicts with United States Supreme Court decisions and decisions of other United States Court of Appeals.

In the case of Frederick Matthews v. United States, 485 US 58, 99 L Ed 2d 54, 108 S Ct 883 (1988) the court held that a Defendant in a Federal Criminal

Prosecution is entitled to have the jury instructed on the defense of entrapment whenever there is sufficient evidence from which a reasonable jury could find entrapment, even if the Defendant denies one or more elements of the crime, and the question whether the evidence at trial was sufficient to support such an instruction was open for the court of appeals on remand, since the question had been pretermitted by the court.

The case which is presently before the court is analogous to that of Matthews, supra, where the court held was entitled to have the jury instructed on the defense of entrapment where a reasonable jury could find entrapment. In the case at bar the jury should have been instructed on the defense of entrapment, as a reasonable jury would have found that entrapment existed. Based upon Sherman v. United States, 356 US 369, 376-378, 2 L ED 2d 848, 78 S Ct 819 (1958), a valid entrapment defense has two elements: (1) government inducement of a crime, and (2) lack of predisposition on the part of the Defendant to engage in criminal conduct.

The first element set forth in Sherman is met by the testimony of Drug Enforcement Agent (D.E.A.)

Della Woods who stated that she solicited Cedric Adams to sell marijuana for her and he refused (T-77). Eventually the D.E.A. persisted and Petitioner was induced and became involved in a cocaine transaction. Agent Woods testified that she did not think that Petitioner would be able to produce any buyers (T102), and that she doubt whether or not he knew someone with a landing strip in order to bring in airplanes (T-88) and whether he knew someone with a fast boat to bring in cocaine, to all of this Petitioner answered in the negative, which is descriptive of the fact that Petitioner did not have the knowledge or the interest in committing the crime charged. Thus Petitioner was not predisposed to engage in criminal conduct, satisfying the second element of Sherman, supra, whereby Defendant should have been entitled to have the jury instructed on the defense of entrapment.

In a very recent case decided by this Honorable Supreme Court, Jacobson v. United States, No. 90-1124 (1192) the court held that "the prosecution failed, as a matter of law, to induce evidence to support the jury verdict that Jacobson was

predisposed, independent of the Government's acts and beyond a reasonable doubt, to violate the law...In their zeal to enforce the law, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. The key phrase here is the government's "zeal to enforce the law.." as cited in Jacobson, is very descriptive of the governments involvement with petitioner. There was testimony in the case of the Petitioner where the Drug Enforcement Agent testified that she was offered twenty-five percent of any seizure resulting from a case that she was working on. That she received Five Thousand ($5,000.00) Dollars in advance and in addition she received Twenty One Thousand ($21,000.00) Dollars from the money seized. The D.E.A. Agent further testified that she was employed as a Barber (T-70), and that income from this trial has affected her income tremendously. (T-71). Therefore because

of her zeal to make a profit the Drug Enforcement Agent induced Petitioner, a person who was not predisposed to commit a crime, into committing the crime.

The Jacobson Court, supra also stated the "when the Government's quest for convictions leads to apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene". The case of Petitioner is one where the court should intervene where he was a law-abiding citizen and the Drug Enforcement Agent testified that when he was approached she did not think that he would be able to produce buyers (T-102).

Furthermore, the courts should intervene, because as said in Sherman, supra, the question of entrapment is generally one for the jury, rather than for the court. This was also stated in Matthew, supra, where the court said that as a general proposition a Defendant is entitled to an instruction as to any recognized defense for which there exist evidence sufficient for a reasonable jury to find in his favor.

'The issues of fact in a criminal trial are usually developed by the evidence adduced and the court's instructions to the jury. A single plea of not guilty, Fed Rule Crim. Proc. 11, puts the prosecution to its proofs as to all elements of the crime charged, and raises the defense of entrapment", Matthews, supra. Therefore Petitioner should have had the opportunity to have the jury decide the issue of entrapment where he raised the defense of entrapment. (T-103,184).

If it were to be argued by respondent that the evidence at trial was insufficient to support an instruction on the defense of entrapment, this argument would fail based upon the arguments set forth above, and also based upon the holding of Matthews, supra, where the court stated the following:

"The Government contends as an alternative basis for affirming the judgment below that the evidence at trial was insufficient to support an instruction on the defense of entrapment. Of course evidence that government agents merely afforded

an opportunity or facilities for the commission of the crime would be insufficient to warrant an instruction. But this question was pretermitted by the Court of Appeals and it will be open for consideration by the court on remand." Thus based upon Matthews, the case that Petitioner is presenting to this court should be reversed and remanded, as the question or whether the government agents merely afforded an opportunity for the commission of the crime or induced a person who was not predisposed to commit a crime was pretermitted by the Court of Appeals.

The requested instruction was absolutely vital to the Petitioner's defense, and the failure to give said instruction denied the Petitioner of his defense. This is an important issue in that no person should be denied the right to have a court instruct if the theory has foundation in evidence and legal support. United States v. Williams, 692 F2d 1345 (11th Cir 1982).

The decision of the trial court below constitutes reversible error based upon United States

v Stone, 702 F2d 1333 (11th Circuit 1983), where the court held that the District Court's refusal to deliver appellant's requested instruction (12) is correct; (2) is not substantially covered by other instructions which were delivered; and (3) deals with some point in the trial so "vital" that the failure to give the requested instruction seriously impaired the Defendant's ability to defend. The requested instruction was correct, in that entrapment is a valid defense where the Petitioner was induced to commit the crime by the government officials and was not predisposed to commit the crime. There were no instructions given that could have possibly covered this much needed instruction. Furthermore, this instruction was absolutely paramount to the Petitioners case in that without the jury being instructed on such a vital defense the jury could not properly decide the issues presented.

ISSUE II

PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND A TRIAL BY AN IMPARTIAL JURY WHERE THE DISTRICT COURT GAVE A MODIFIED ALLEN CHARGE TO THE JURY WHICH WAS PREJUDICIAL AND COERCIVE, WHERE THE JURY INDICATED IT WAS DEADLOCKED, BUT RETURNED A VERDICT OF GUILTY AFTER ONLY ONE ADDITIONAL HOUR OF DELIBERATION.

The jury deliberated for approximately seven (7) hours on October 4, 1990. At approximately 5:20 p.m. the jury informed the judge that it could not reach a unanimous verdict. The judge dismissed the jury for the day and informed counsel that he intended to give a modified Allen charge. Upon returning to court on October 5, 1990 defense counsel stated his objection to the courts giving the Allen charge, however the charge was given over the defense counsel's objection. The jury resumed deliberations at 9:15 a.m. and returned a verdict at 10:30 a.m.

The giving of the modified Allen charge was coercive and prejudicial and violated appellants right to a trial by an impartial jury and due process of law.

"Every circuit except the fifth has either forbidden the use of the instruction or required trial judges to how closely to the language used in the original Allen charge." United States v. Bailey 468 F.2d 652, 667-668 (5th Cir. 1972).

Any variation upon the precise language approved in Allen imperils the validity of the trial. United States v. Scott, 547 F2d 334 (1977).

In the case at bar the trial court judge decided to excuse the jury after deliberating for approximately a full day and stated the following:

> "I am going to bring them in, I'm going to excuse them for the day, and I'm going to ask them to come back tomorrow morning at 9 o'clock, at which time I will give them a modified "Allen Charge"...(T-210)

Furthermore the trial court did not include the elements of the original charge which would have reduced the negative effects of the "Allen Charge". The court stated the following in United States v. Angiulo, 485 F.2d 37 (1973),..."in all events, the court should be careful to include all

those elements of the original designed to ameliorate its coercive effect, and to avoid language which might heighten it." "For the judge, without ameliorative "balancing" language, to instruct a deadlocked jury to re-examine its position may be prejudicial to a Defendant in at least three ways. First, either directly or by implication it may place the burden of reconsideration upon jurors holding a minority opinion, thereby losing for the Defendant whatever influence a minority in favor of acquittal might have in the jury room. Secondly, such a charge may cause a jury to agree when they might otherwise never have come to any agreement, thereby losing for the Defendant whatever safeguard he might have had in a hung jury, a declaration of mistrial, and either a new trial or a subsequent decision by the prosecutors not to retry the case. Thirdly, and closely allied to the other two, the charge might move some jurors to forget the prosecution's heavy burden of proof and the

Defendant's fundamental presumption of innocence. Pugliano v. United States, 348 F2d 902, 904 (1st Cir. 1965).

The Angiulo court, supra, went on to say that..."whenever a jury first informs the court that it is deadlocked, any supplemental instruction which urges the jury to return to its deliberations must include the three balancing elements stated above." The decision of the trial court as well as the decision of the United States Circuit Court for the Eleventh Circuit in affirming the case at bar is in direct conflict with the United States Circuit Court (1st Cir.).

Based upon the three prong test as set forth in Angiulo, supra the modified "Allen Charge" had a detrimental effect on the case that Petitioner presently brings before the court. As set forth above the jury was deliberating for approximately seven hours and was dismissed, returned the next

morning, upon receiving the modified Allen Charge deliberated for forty five minutes and returned with a verdict.

Although it may not be clearly ascertainable as to whether there was a direct effect on the jury, the implication that the modified "Allen Charge" had an influence upon jurors holding a minority opinion is overwhelming. Where the jury deliberates for a seven hours and returns with a verdict forty five minutes after the "Allen Charge" was given. If the modified "Allen Charge" were not given Petitioner could have possibly and a hung jury. Furthermore the charge may have led certain jurors to disregard the prosecution's heavy burden of proof.

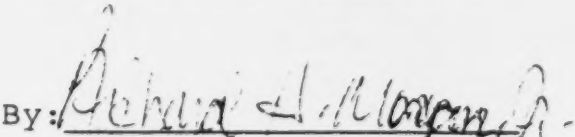
It is imperative that a Defendant be allowed a fair trial, and where a court is allowed to give a modified "Allen Charge" the chances of a fair trail are non-existent and the judicial system suffers as a result.

CONCLUSION

It would be a travesty of justice if the decision of the Eleventh Circuit's opinion were allowed to stand, as it denied the defendant a right to a fair trial where he made a request for a jury instruction on entrapment, and where there was sufficient evidence from which a reasonable juror could find entrapment. Furthermore the court should not be allowed to give a modified "Allen Charge", as it did in this case, as it denied the accused of his constitutional right to a fair trial.

WHEREFORE, Petitioner respectfully prays that this Honorable Untied States Supreme Court grant a writ of certiorari to review the judgment of the court below, in denying Petitioners request for a jury instruction on entrapment, and for giving a modified "Allen Charge".

Respectfully submitted,

By: 

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APPENDIX

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Opinion of the United States Court of Appeals for the Eleventh Circuit . . . A 2

Judgment from the United States Court of Appeals for the Eleventh Circuit . A 4

Judgment of Sentence from the United States District Court for the Southern District of Florida . . . . . A 5

OPINION OF THE ELEVENTH CIRCUIT,
filed March 12, 1992.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[DO NOT PUBLISH]

No. 91-5048
Non-Argument Calendar

D.C. Docket No. 90-8003-Cr-JAG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CEDRIC ADAMS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(March 12, 1992)

Before TJOFLAT, Chief Judge, BIRCH, Circuit Judge, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

The appellant, Cedric Adams, was convicted in the United State District Court, Southern District off Florida, with knowingly and intentionaly attempting

to possess cocaine with intent to distribute it, in violation of 21 U.S.C.A. § 846. Cedric Adams now appeals and presents to this Court in his appeal the following issues:

1. Whether the district court properly denied appellant's request for a jury instruction on the affirmative defense of entrapment;

2. After the jury, during its delierations, advised the court that it could not reach a unanimous verdict, whether appellant was denied his constitutional right to a trial by an impartial jury when the district court gave a modified Allen charge to the jury.

The record clearly reflects that the appellant received a fair trial and there was no error committed by the district court.

We AFFIRM.

The district court did not give the modified Allen charge until after the jury advised the court on two occasions that it could not reach a unanimous verdict.

A 4

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5048
Non-Argument Calendar

D. C. Docket No. 90-8003-Cr-JAG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CEDRIC ADAMS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

Before TJOFLAT, Chief Judge, BIRCH, Circuit Judge and JOHNSON, Senior Circuit Judge.

J U D G M E N T

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34 - 3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

Entered: March 12, 1992
For the Court: Miguel J. Cortez, Clerk

ISSUED AS MANDATE: APR 03 1992

By: Karleen McNabl
Deputy Clerk

A 5

UNITED STATES DISTRICT COURT

SOUTHERN District of FLORIDA

UNITED STATES OF AMERICA
v.
CEDERIC ADAMS (01)
#77811-004

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 90-8003-CR-GONZALES (01)

Thomas Rolle
P. O. Box 1164 - West Palm Beach, FL
Defendant's Attorney
Jeffrey Levenson, AUSA

THE DEFENDANT:

_ pleaded guilty to count(s) N/A,

X was found guilty on count(s) two of the Superseding Indictment, after plea of not guilty, Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense
21:841 (a) (1) and 846; and 18:2	Attempt to possess with intent to distribute at least five kilograms of cocaine.

Date Offense Concluded	Count Number(s)
1-21-90	two

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

XXX The defendant has been found not guilty on count(s) one of the Superseding Indictment, and is discharged as to such count(s).

XXX Count(s) N/A (is)(are) dismissed on the motion of the United States.

XXX It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) 2 of the superseding indictment, which shall be due X immediately ___ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 302-56-8658

Defendant's Date of Birth: 6-21-58

Defendant's Mailing Address:

M.C.C. - 15801 S.W. 137th Ave.
Miami, FL

January 11, 1991
Date of Imposition of Sentence

Signature of Judicial Officer

Hon. Jose A. Gonzales, Jr.
Name & Title of Judicial Officer

Defendant's Residence Address:

January 14, 1991
Date

1306 Wedgewood Plaza Dr.
Riviera Beach, FL 33404

Defendant: Cederic Adams Judgment-Page 2 of 4
Case Number 90-8003-Cr-JAG

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imposed for a term of ONE HUNDRED AND SIXTY EIGHT (168) MONTHS as to count two of the indictment.

The defendant shall receive credit for any time spent in federal custody as to this offense.

____ The court makes the following recommendations to the Bureau of Prisons:

XXX The defendant is remanded to the custody of the United States marshal.

___ The defendant shall surrender to the United States marshal for the district.

____ at ____a.m. on _____
____ as notified by the United States marshal.

____ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
____ before 2 p.m. on _____
____ as notified by the United States marshal.
____ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy Marshal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition For A Writ of Certiorari To The United States Court of Appeals For the Eleventh Circuit was mailed this 10th day of August, 1992 to: Solicitor General, Department of Justice, Washington, D.C. 20530.

Vanessa Whiters

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Supreme Court, U.S.
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No. 92-271

In the Supreme Court of the United States

OCTOBER TERM, 1992

CEDRIC ADAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in declining to instruct the jury on entrapment.

2. Whether the district court erred in giving a modified *Allen* charge to the jury.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. A2-A3, is unreported, but the judgment is noted at 958 F.2d 1083 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1992. The petition for a writ of certiorari was filed on June 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner

was convicted of attempting to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. Pet. App. A5.* The district court sentenced him to 168 months' imprisonment, *id.* at A7, to be followed by a five-year period of supervised release. Pet. 3. The court of appeals affirmed. Pet. App. A2-A3.

1. In August 1989, Dee Woods, a former drug dealer, went to the West Palm Beach, Florida, office of the DEA and agreed to assist the agency in apprehending drug traffickers in exchange for 25 percent of the cash and assets seized as a result of her assistance. Gov't C.A. Br. 3, 7. While she was assisting the DEA in an investigation unrelated to petitioner, petitioner contacted her and inquired about the availability of cocaine for sale. *Id.* at 3. Before Woods began working with the DEA, she and petitioner had offered drugs to each other, but petitioner had refused marijuana offered by Woods, and Woods had refused cocaine offered by petitioner. *Ibid.*

After petitioner's call, Woods arranged for petitioner to meet two undercover DEA agents posing as cocaine suppliers. Gov't C.A. Br. 4. The meeting took place at a restaurant in Palm Beach County, Florida. *Ibid.* Petitioner said that he was interested in a regular business arrangement under which he would purchase eight to ten kilograms of cocaine twice each month. *Ibid.* He described himself as a middleman representing buyers from Chicago and Detroit. *Id.* at 4-5. He requested a total of 11 kilograms of cocaine, eight for the Detroit buyers and

* The jury acquitted petitioner of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846.

three for the Chicago buyers. *Id.* at 5. He agreed to a price of $16,000 per kilogram for a minimum order of five kilograms. *Ibid.* At the end of the meeting, petitioner said he would contact Woods when the out-of-town buyers arrived. *Ibid.*

On January 21, 1990, petitioner contacted one of the undercover agents through Woods. Gov't C.A. Br. 5. Petitioner said that his Detroit contacts were in town and that he was ready to complete a five and one-half kilogram cocaine deal. *Ibid.* He also said he had seen and counted the money for the cocaine. *Ibid.* The agent suggested that the exchange take place at the restaurant where they had previously met. *Ibid.*

Petitioner arrived at the restaurant with Gregory Mays and Mark Sanders. Gov't C.A. Br. 5. Petitioner identified Mays and Sanders as the out-of-town buyers and allowed Woods to look at the money. *Id.* at 5-6. Woods then got into the car and shook hands with Mays and Sanders, who confirmed that they were the buyers and that they had the money for the transaction. *Id.* at 6. When petitioner said he wanted to accompany one of the agents to transport the cocaine to his apartment, the other agent gave a pre-arranged arrest signal, and petitioner, Sanders, and Mays were arrested. *Ibid.*

Incident to the arrest, the agents seized a plastic bag containing $88,773. Gov't C.A. Br. 6. A search of the car in which petitioner had arrived at the restaurant revealed a secret compartment in the car's trunk. *Ibid.* Vacuum sweepings from the compartment were analyzed and found to contain cocaine residue. *Ibid.*

2. At trial, at the close of evidence, petitioner requested that the district court charge the jury on the affirmative defense of entrapment. Pet. 8. The district court denied the request. Pet. 9.

3. After the jury had deliberated for approximately six and one-half hours, it sent a note to the trial judge asking the judge to reread the instructions and stating that it was unable to reach a decision at that time. Pet. 9; Gov't C.A. Br. 16. The judge read the jury instructions a second time, after which the jury resumed its deliberations. Pet. 9; Gov't C.A. Br. 16. Approximately one hour later, the jury sent a note to the trial judge again stating that it was unable to reach a unanimous decision. Pet. 9; Gov't C.A. Br. 16.

The district court then declared a recess until the following morning and informed the parties that the court would give the jury a modified *Allen* charge, see *Allen* v. *United States*, 164 U.S. 492 (1896), in the morning. Pet. 9; Gov't C.A. Br. 16. Over petitioner's objection, the district court gave the modified *Allen* charge set forth in the Eleventh Circuit's Pattern Jury Instructions (Criminal Cases). The instruction advised the jury as follows:

> Members of the jury, I'm going to ask that you continue your deliberation in an effort to reach agreement upon a verdict and dispose of this case; and I do have a few additional comments I would like for you to consider as you do so.
>
> As you know, this is an important case. The trial has been expensive in time, effort, money,

and emotional strain to both the defendant and the prosecution.

If you should fail to agree upon a verdict, the case will be left open and may have to be tried again.

Obviously, another trial would only serve to increase the cost to both sides, and there is no reason to believe the case can be tried again by either side any better or more exhaustively than it has been tried before you.

Any future jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced.

If a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one, since it appears to make no effective impression on the minds of others.

On the other hand, if a majority or even a lesser number of you are in favor of acquittal, the rest of you should ask yourselves again, and most thoughtfully, whether you should accept the weight and sufficiency of evidence which fails to convince your fellow jurors beyond a reasonable doubt.

> Remember at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence; but after full deliberation and consideration of the evidence in the case, it is your duty to agree upon a verdict if you can do so.
>
> You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt, the defendant should have your unanimous verdict of not guilty.
>
> You may be as leisurely in your deliberations as the occasion may require, and should take all the time which you may feel is necessary.
>
> I will ask now that you retire once again and continue your deliberations with these additional comments in mind to be applied, of course, in conjunction with all of the other instructions previously given to you.

Gov't C.A. Br. App. Approximately one hour and 15 minutes after receiving this modified *Allen* charge, the jury returned its verdict. Pet. 12; Gov't C.A. Br. 17.

4. The court of appeals affirmed by an unpublished per curiam opinion. Pet. App. A2-A3. The court concluded that "[t]he record clearly reflects that [petitioner] received a fair trial and there was no error committed by the district court." *Id.* at A3.

ARGUMENT

1. Petitioner contends that the district court erred in denying petitioner's request for an entrapment instruction. Pet. 13-20.

"[A] valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." *Mathews* v. *United States*, 485 U.S. 58, 63 (1988). "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Ibid.* In this case, petitioner failed to present evidence from which a jury could reasonably find either of the necessary elements of the entrapment defense: that the government induced petitioner to commit a crime or that petitioner was not predisposed to commit one. The district court thus properly denied his request for an entrapment instruction. See *United States* v. *Molinaro*, 877 F.2d 1341, 1349 (7th Cir. 1989) (defendant "must demonstrate that there was sufficient evidence for a reasonable jury to find that the government induced her to commit the crime and that she was not predisposed to engage in the criminal conduct").

a. Petitioner did not present evidence sufficient for a reasonable jury to find that the government induced him to commit a crime. "Inducement focuses on whether the government's conduct could have caused an undisposed person to commit a crime." *United States* v. *Kelly*, 748 F.2d 691, 697 (D.C. Cir. 1984). Thus, a government agent who merely seeks out the defendant, or proposes an illegal transaction, does not induce the defendant to commit a crime. See, *e.g.*, *United States* v. *Wright*, 921 F.2d 42, 45 (3d Cir. 1990), cert. denied, 111 S. Ct. 2803 (1991); *United States* v. *Humphrey*, 670 F.2d 153, 156 (11th Cir.),

cert. denied, 456 U.S. 1010 (1982); see also *Jacobson* v. *United States*, 112 S. Ct. 1535, 1541 (1992) ("Had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, * * * it is unlikely that his entrapment defense would have warranted a jury instruction."). And "[l]aw enforcement officials * * * may properly make use of undercover operations, in which they assume false names and false appearances." *Kelly*, 748 F.2d at 698 n.16; see also *Jacobson*, 112 S. Ct. at 1540 ("there can be no dispute that the Government may use undercover agents to enforce the law"); *Sorrells* v. *United States*, 287 U.S. 435, 453-454 (1932) (Roberts, J., concurring) ("Society is at war with the criminal classes, and courts have uniformly held that in waging this warfare the forces of prevention and detection may use traps, decoys, and deception to obtain evidence of the commission of crime.").

In this case, petitioner contacted Adams, the government's confidential informant, to inquire about the availability of cocaine for sale, and he took the lead in seeking to arrange the transaction. Compare *Sorrells*, 287 U.S. at 441 (crime "was instigated by the prohibition agent"). His action thereby establishes that the government's conduct did not "induce" him to commit the crime.

b. Petitioner also failed to present evidence sufficient to allow a reasonable jury to find that he was not predisposed to commit the offense. "The predisposition requirement is meant to eliminate the entrapment defense for those defendants who would have committed the crime anyway, even absent Government inducement." *Jacobson* v. *United States*, 112 S.

Ct. 1535, 1546 (1992) (O'Connor, J., dissenting). It is "a state of mind which readily responds to the opportunity furnished by the officer or his agent to commit the forbidden act for which the accused is charged." *United States* v. *Burkley*, 591 F.2d 903, 913-916 (D.C. Cir. 1978), cert. denied, 440 U.S. 966 (1979) (quotation marks omitted). Thus, "an agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs, and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate 'sting' operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition." *Jacobson*, 112 S. Ct. at 1541.

Therefore, to make the required showing that he was not predisposed, a defendant must establish that he was reluctant to commit the offense and that his reluctance was overcome only by government inducement or persuasion. See *Jacobson*, 112 S. Ct. at 1541 ("By the time petitioner finally placed his order, he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations"); *Sorrells*, 287 U.S. at 441 ("agent lured defendant, otherwise innocent, to * * * commission [of the crime] by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War"); *United States* v. *Reynoso-Ulloa*, 548 F.2d 1329, 1336 (9th Cir

1977) ("most important factor" is "whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducement"), cert. denied, 436 U.S 926 (1978).

At all times, petitioner showed that he was "ready and willing" to commit the crime. See *Kelly*, 748 F.2d at 699. He initially contacted Woods and said he was interested in purchasing cocaine both for out-of-town buyers and for himself. At his first meeting with the DEA agents, he claimed to represent out-of-town purchasers who were interested in buying multi-kilogram amounts of cocaine on a biweekly basis. Throughout the relevant time period, petitioner remained ready and willing to complete the proposed transaction. He did reduce the amount of cocaine involved in the deal from 11 kilograms to five and one-half kilograms, but he offered no evidence showing that either Woods or the agents played any role in establishing the cocaine amounts. Petitioner called Woods to arrange the deal after the buyers arrived, and he accompanied the buyers to the agreed-upon site of the exchange of cocaine for more than $88,000 in cash. The district court thus correctly denied petitioner's request for an entrapment instruction.

2. Petitioner also contends that the district court erred when it gave a modified *Allen* charge to the jury. Pet. 21-25. That contention is without merit.

This Court has held on numerous occasions that supplemental instructions like the one given here are not per se coercive. *Lowenfield* v. *Phelps*, 484 U.S. 231, 237-241 (1988); *Kawakita* v. *United States*, 343 U.S. 717, 744 (1952), aff'g 190 F.2d 506, 521-528 (9th Cir. 1951); *Lias* v. *United States*, 284 U.S. 584, aff'g 51

F.2d 215, 218 (4th Cir. 1931); *Allen* v. *United States*, 164 U.S. 492, 501-502 (1896); see also *Lowenfield* v. *Phelps*, 484 U.S. at 238 n.1 (collecting circuit cases reaching same conclusion).

Petitioner argues that the *Allen* charge—"in its context and under all the circumstances," *Jenkins* v. *United States*, 380 U.S. 445, 446 (1965)—coerced the jury into returning a guilty verdict on one of two counts against petitioner. The factors usually examined as part of this inquiry, however, show that use of the *Allen* charge in this case was not impermissibly coercive.

First, the judge neither inquired into nor learned of the numerical division of the jury. See *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926) (if the trial judge inquires into the numerical division of the jury and then gives an *Allen* charge, the charge is considered per se coercive). If the trial judge does not have such knowledge, an *Allen* charge is evenhanded (assuming, as the law does, that a hung jury is of equal benefit and detriment to the prosecution and the defense): "[I]n an ordinary criminal trial, an *Allen* charge will not steer the jury one way or the other on the merits, because it is as likely that the minority jurors are for conviction as for acquittal." *Lowenfield* v. *Phelps*, 484 U.S. at 252 (Marshall, J., dissenting).

Second, the district court gave the *Allen* charge only once. See *United States* v. *Seawell*, 550 F.2d 1159, 1163 (9th Cir. 1977) ("If the charge is to pass muster as instruction on the law there is little need to repeat it save at the jury's request.").

Third, the district court told the jurors: "Remember at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence." P.6, *supra*. A reminder such as that "supports the conclusion that the *Allen* charge was not impermissibly coercive." *United States* v. *Ajiboye*, 961 F.2d 892, 894 (9th Cir. 1992).

Fourth, the district judge did not *order* the jury to return a verdict; rather, the judge told the jury that "it is your duty to agree upon a verdict *if you can do so*." P.6, *supra*; see *Hyde & Schneider* v. *United States*, 225 U.S. 347, 382 (1912) (rejecting claim of coercion because judge told the jury that if "they could not conscientiously and freely agree upon a verdict they would be discharged").

Fifth, the district court did not fix a time limit for the jury's further deliberations. Instead, the court stated: "You may be as leisurely in your deliberations as the occasion may require, and should take all the time which you may feel is necessary." P.6 *supra*; cf. *United States ex rel. Anthony* v. *Sielaff*, 552 F.2d 588, 590 (7th Cir. 1977) (time limit on further deliberations can be coercive).

Sixth, the jury did not immediately return its verdict after the charge; instead, the jury continued to deliberate for approximately an hour and a quarter after receiving the instruction. This indicates that the jury was not impermissibly coerced. See, *e.g.*, *United States* v. *Nichols*, 820 F.2d 508, 512 (1st Cir. 1987) (one-hour period between charge and verdict not indicative of coercion); *United States* v. *Smith*, 635 F.2d 716, 721-722 (8th Cir. 1980) (45-minute period not

indicative of coercion); *United States* v. *Bailey*, 480 F.2d 518 (5th Cir. 1973) (en banc) (90-minute period not indicative of coercion); *Andrews* v. *United States*, 309 F.2d 127, 129 (5th Cir. 1962) (25-minute period not indicative of coercion), cert. denied, 372 U.S. 946 (1963).

Finally, the jury did not return guilty verdicts on all the counts before it; instead, the jury convicted petitioner on one count, but not on the other. See *United States* v. *Foster*, 711 F.2d 871, 884 (9th Cir. 1983) (the fact that the jury rendered discriminating verdicts "significantly weakens [the] argument that the jury was coerced by the *Allen* charge"), cert. denied, 465 U.S. 1103 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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